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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

B5

FILE:

Office: TEXAS SERVICE CENTER

Date: **SEP 22 2010**

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an architectural firm. It seeks to employ the beneficiary permanently in the United States as a project consultant. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. The equivalent of an advanced degree is either a U.S. baccalaureate or foreign equivalent degree followed by at least five years of "progressive experience" in the specialty. 8 C.F.R. § 204.5(k)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on April 23, 2007. The proffered wage as stated on the Form ETA 9089 is \$58,200.00 per year. According to the Form ETA 9089 the position requires a master's degree in architecture or a related field and twelve months of experience in the job offered or in a related occupation.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

On the I-140 petition the petitioner claimed to have been established in 1996 and to currently have 11 employees. On the Form ETA 9089, signed by the beneficiary on June 5, 2007, the beneficiary claimed to have worked for the petitioner beginning February 17, 2005.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has submitted copies of Forms W-2, Wage and Tax Statement, for the years 2007 through 2009. The Forms W-2 show that the petitioner paid the beneficiary [REDACTED] in 2009. Because the petitioner paid the beneficiary less than the full proffered wage, it must establish its ability to pay the difference between the proffered wage and wages actually paid to the beneficiary in each year - [REDACTED]

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, --- F. Supp. 2d ---, 2010 WL 956001, at \*6 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The record before the director closed on March 31, 2010 with the receipt of the petitioner's submissions in response to the AAO's request for evidence. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2007 and 2008, as shown in the table below.

- In 2007, the Form 1120S stated net income<sup>1</sup> of -
- In 2008, the Form 1120S stated net income of -

The petitioner had sufficient net income to pay the proffered wage in 2008. The petitioner did not have sufficient net income to pay the proffered wage in 2007.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. In 2007, the Form 1120S stated net current assets of - Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in 2007.

On appeal, counsel argues that the petitioner's tax returns establish its ability to pay the proffered wage. Specifically, counsel states that, in order to determine the petitioner's ability to pay the proffered wage, the "compensation of officers" listed on line 7 of the petitioner's income tax returns should be added back to the petitioner's net income.

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<sup>1</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed September 8, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions and/or other adjustments shown on its Schedule K for 2007 and 2008, the petitioner's net income is found on Schedule K of its tax returns.

<sup>2</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The sole shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category stated on Form 1120S. Accordingly, in certain circumstances, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner in addition to its figures for ordinary income.

USCIS has long held that it may not "pierce the corporate veil" and look to the assets of a corporation's owners to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In the present case, however, USCIS is not examining the personal assets of the petitioner's owners, but, rather, the financial flexibility that the owners have in setting their salaries based on the financial performance of their company.

A review of the tax returns submitted indicates that because of officers' compensation withdrawn by the sole shareholders in each year from 2004 to 2008, the petitioner's net income is substantially reduced. As noted above, the petitioner's net income for 2007 was less than the proffered wage. Since the company is closely held, the owners may in their business discretion take less officers' compensation. The sole two shareholders of the corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. As noted above, compensation of officers is an expense category explicitly stated on the income tax returns submitted by the petitioner. For this reason, the petitioner's figures for compensation of officers may be considered in some instances as additional financial resources in addition to ordinary income.

On February 18, 2010, this office issued a request for evidence noting that the record did not contain any evidence that the petitioner's shareholders were willing or able to relinquish in whole or in part their officers' compensation in order to pay the proffered wage. Therefore, this office requested evidence, including affidavits from the petitioner's shareholders, to establish that the shareholders were willing to forego compensation as of the priority date.

The petitioner responded to the request for evidence on March 31, 2010. Included in the response was an affidavit from [REDACTED] and [REDACTED]. According to the petitioner's tax returns, [REDACTED] each own fifty percent of the petitioner's stock. In the affidavit, [REDACTED] state that they are willing to forego their officer compensation to pay the proffered wage. As noted above, the petitioner's 2007 tax return shows officer compensation of [REDACTED].

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other

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relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The appeal is sustained. The petition is approved.